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No. 83-6766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOE HAYES, *Petitioner*,

v.

FLORIDA, *Respondent*.

On Writ Of Certiorari To The District Court Of Appeal Of Florida, Second District

BRIEF FOR PETITIONER

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TENTH JUDICIAL CIRCUIT
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QUESTION PRESENTED

Whether *Davis* v. *Mississippi*, 394 U.S. 721 (1969), prohibits a warrantless, non-consensual detention of a citizen, undertaken without probable cause, for the purpose of obtaining the citizen's fingerprints for comparison with prints found at the scene of a crime, and whether *Terry* v. *Ohio*, 392 U.S. 1 (1968), may be extended to permit such detentions?

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OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Second District, affirming Petitioner's convictions of burglary and sexual battery is reported in *Hayes* v. *State*, 439 So.2d 896 (Fla.2d DCA 1983), *rev.den.* 447 So.2d 886 (Fla. 1984)(J.A.32-44).

JURISDICTION

The jurisdiction of this Court is conferred by Title 28 U.S.C. § 1257(3) and Rule 17(1)(c), United States Supreme Court rules, Petitioner having asserted below a deprivation of his rights as guaranteed under Amendments IV and XIV, United States Constitution.

The judgment of the District Court of Appeal of Florida, Second District, was entered September 16, 1983, (J.A.32-44). A timely motion for rehearing was denied by that court November 2, 1983 (J.A.45), and the Florida Supreme Court denied a petition for discretionary review March 22, 1984 (J.A.46). The petition for writ of certiorari was filed May 18, 1984, and granted October 1, 1984. (J.A.47).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the Constitution of the United States guarantees the right of citizens to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. The Fourth Amendment is applicable to the states by virtue of the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

STATEMENT OF THE CASE

Petitioner JOE HAYES was charged by information filed in the Circuit Court, Twentieth Judicial Circuit,

Charlotte County, Florida, with the offenses of burglary and sexual battery (J.A.1-3). After conviction by a jury he was sentenced to 99 years in state prison October 5, 1981, by the Honorable James R. Adams, Circuit Judge (J.A.27-31).

The pertinent facts of the case are as follows: Petitioner was one of several suspects in a series of burglary/rapes occurring in Punta Gorda, Florida, in 1980 (J.A.20,33). Latent fingerprints had been found on the bedroom doorknob of one of the victims, a Mrs. Julienne Hollander (J.A.32). Desirous of obtaining Petitioner's prints for comparison, Detectives Shoup and Gandy of the Punta Gorda Police Department went to Petitioner's home June 23, 1980 (J.A.18,33). Shoup testified he was prepared to arrest Petitioner if he refused to cooperate (J.A.12,33). The police neither sought nor obtained a search warrant, and could give no reason for this omission (J.A.10-11,22-23,33). Petitioner was reluctant to accompany the officers, but did so after they told him they would arrest him (J.A.19-20,33). After Petitioner's prints were found to match those from the Hollander residence, he was arrested and charged with burglary and rape (J.A.11,33).

On September 24, 1980, Petitioner moved to suppress the fingerprint evidence, claiming it had been obtained illegally (J.A.4-7). The motion was heard October 20, 1980, by the Honorable Richard M. Stanley, Circuit Judge (J.A.8-26). The court denied the motion without expressly stating its reasons for doing so (J.A.26). Judge Stanley's ruling provided the principal ground for appeal to the District Court of Appeal of Florida, Second District, as well as the instant proceeding.

The District Court of Appeal of Florida, Second District, affirmed the conviction and sentence September 16, 1983 (J.A.32-44). Specifically, the court agreed with Peti-

tioner that he was detained without probable cause and without his consent (J.A.33-34) but nonetheless justified the seizure of his person as "a logical extension" of *Terry* v. *Ohio*, 392 U.S. 1 (1968)(J.A.43).

SUMMARY OF ARGUMENT

Petitioner was detained by detectives who wished to obtain his fingerprints for comparison with prints found at the scene of a rape. The District Court of Appeal of Florida, Second District, agreed with Petitioner on two points: (1) that there was no probable cause to arrest Petitioner, at least prior to the print comparison; and (2) that Petitioner did not freely and voluntarily submit to the detention. Nevertheless, the court concluded that the situation was distinguishable from that involved in Petitioner's principal authority, *Davis* v. *Mississippi*, 394 U.S. 721 (1969), and held that *Terry* v. *Ohio*, 392 U.S. 1 (1968), and related cases could be extended to permit the seizure of Petitioner's person for fingerprinting.

The conclusion of the Court of Appeal is without foundation. The requirements set forth in *Davis* v. *Mississippi*, that probable cause must exist before police may conduct an "investigatory detention" of a citizen, have never been overruled by this Court, and the case at bar is indistinguishable in principle from *Davis*. Only a few exceptions have been created to the probable cause requirement, involving additional and necessary elements such as emergency, exigency, or prior judicial authorization, not found in the case at bar. *Terry* v. *Ohio* simply does not constitute the investigative tool characterized by the Court of Appeal. While more recent cases, such as *United States* v. *Dionisio*, 410 U.S. 1 (1973), suggest lawful means may exist in theory for accomplishing the goals of the police in the case at bar, no such means

were employed herein, and thus the deterrent function of the exclusionary rule should be invoked. Other cases in the wake of *Davis*, such as *Dunaway* v. *New York*, 442 U.S. 200 (1979), and *Florida* v. *Royer*, 460 U.S. 491, 75 L.Ed.2d 229, 103 S.Ct. ____ (1983), only serve to confirm that the police procedures in the case at bar are offensive to the Fourth Amendment.

ARGUMENT

DAVIS V. MISSISSIPPI, 394 U.S. 721 (1969), PROHIBITS A WARRANTLESS, NONCONSENSUAL DETENTION OF A CITIZEN, UNDERTAKEN WITHOUT PROBABLE CAUSE, FOR THE PURPOSE OF OBTAINING THE CITIZEN'S FINGERPRINTS FOR COMPARISON WITH PRINTS FOUND AT THE SCENE OF A CRIME, AND *TERRY V. OHIO*, 392 U.S. 1 (1968), CANNOT BE EXTENDED TO PERMIT SUCH DETENTIONS.

A. The Nature And Scope Of The Protection Afforded By *Davis v. Mississippi*

On December 2, 1965, an elderly resident of Meridian, Mississippi, was raped in her home by an unidentified black youth. The best evidence available to the investigating officers was a number of finger and palm prints found about a window. During the course of the next few days the police conducted a "dragnet" wherein at least 24 black youths were taken to police headquarters, fingerprinted, and questioned. There was no probable cause to justify any of these detentions, and warrants were neither sought nor obtained beforehand. Among the detainees was one John Davis, aged fourteen. His prints matched those found on the victim's window.

Davis sought without success to have suppressed the fingerprints obtained during this investigatory roundup. Following his conviction for the rape, the Mississippi Supreme Court affirmed. *Davis* v. *State*, 230 So.2d 270

(Miss. 1967). However, their decision was later overturned by this Court in a decision which serves as the point of departure for Petitioner's attack on his own conviction. *Davis* v. *Mississippi*, 394 U.S. 721 (1969).

In *Davis* v. *Mississippi* the Court laid to rest two premises relied upon by the prosecution to support the detentions involved therein. First, citing with approval *Bynum* v. *United States*, 262 F.2d 465 (D.C.Cir. 1958), the Court rejected the argument that fingerprints were not subject to Fourth Amendment protection because of their "inherent trustworthiness."

> True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed.

Bynum, 262 F.2d at 467, quoted in *Davis* v. *Mississippi*, 394 U.S. at 724.

> Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof. The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment. To make an exception for illegally seized evidence which is trustworthy would fatally undermine these purposes.

Davis, 394 U.S. at 724. Evidence in such instances is excluded, "not because it is unreliable, but because it is the produce of conduct that is to be deterred." *Common-*

wealth v. *Youngblood*, 241 Pa.Sup. 72, 359 A.2d 456,459 (1976).

Second, the outcome of *Davis* was not affected by the fact the detention occurred during the "investigatory" phase of the case, rather than the "accusatory" stage when attention had focused upon Davis particularly. The Fourth Amendment applies equally. "We made this explicit only last term," said Mr. Justice Brennan, in *Terry* v. *Ohio*, 392 U.S. 1 (1968).

> [T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harrassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions."

Davis, 394 U.S. at 726-727.

The Court did suggest that fingerprinting might be permissible, even absent probable cause, under "narrowly circumscribed procedures." As will be seen, this language came back to haunt Petitioner in his initial appeal to the Florida District Court of Appeal. However, the Court in *Davis* continued, "the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context." *Davis*, 394 U.S. at 728. Since it was not relevant to Davis' case how the police might go about this, the Court declined to speculate and the question remained open.

Numerous courts at both the state and federal levels adopted the general rules set forth in *Davis* and forbade

the use of fingerprints obtained without warrants or probable cause. *See, e.g., United States* v. *Seay*, 432 F.2d 395 (5th Cir. 1970), *cert.den.* 401 U.S. 942 (1971); *United States* v. *Lyles*, 471 F.2d 1167 (5th Cir. 1973), *cert.den.* 419 U.S. 851 (1974); *United States ex rel. Hollman* v. *Rundle*, 329 F.Supp. 1052 (E.D.Pa. 1971), *aff'd.* 461 F.2d 758 (3d Cir. 1972); *Orum* v. *State*, 46 Ala.App. 543, 245 So.2d 829 (1971); *People* v. *Price*, 86 Mich.App. 641, 273 N.W.2d 97 (1978); *Gandy* v. *State*, 438 So.2d 279 (Miss. 1983); *State* v. *Hunter*, 625 S.W.2d 682 (Mo.App. 1981); *People* v. *Gates*, 24 N.Y. 666, 301 N.Y.S.2d 597, 249 N.E.2d 450 (1969); *State* v. *Walls*, 32 N.C.App. 218, 231 S.E.2d 196 (1977). Similarly, analogy has been made to other types of identification evidence such as handwriting exemplars or photographs, where obtained in like manner. *See, e.g., Bradford* v. *United States*, 413 F.2d 467 (5th Cir. 1969); *United States* v. *Cassell*, 452 F.2d 938 (D.C.Cir.), *cert.den.* 414 U.S. 880 (1973); *United States* v. *Kenaan*, 496 F.2d 181 (1st Cir. 1974); *United States* v. *Long*, 325 F.Supp. 583 (W.D.Mo. 1971), *aff'd.* 453 F.2d 1317 (8th Cir. 1972), *cert.den.* 412 U.S. 927 (1973); *People* v. *Teresinsky*, 30 Cal.3d 822, 180 Cal.Rptr. 617, 640 P.2d 753 (1982); *People* v. *Harris*, 43 Cal.App.3d 854, 118 Cal.Rptr. 106 (App.2d 1975); *People* v. *Gouker*, 628 P.2d 149 (Colo.App. 1981); *People* v. *Pettis*, 12 Ill.App.3d 123, 298 N.E.2d 372 (App.1st 1973); *Jones* v. *Commonwealth*, 556 S.W.2d 918 (Ky.App. 1977); *State* v. *Brown*, 387 So.2d 567 (La. 1980); *Mills* v. *State*, 28 Md.App. 300,345 A.2d 127 (1975), *aff'd.* 270 Md.262, 363 A.2d 491 (1976); *State* v. *Daniels*, 487 S.W.2d 465 (Mo. 1972); *State* v. *Accor*, 277 N.C. 65, 175 S.E.2d 583 (1970); *Leigh* v. *State*, 587 P.2d 1379 (Okla.Crim.App. 1978); *In re Armed Robbery, Albertson's, on August 31, 1981*, 99 Wash.2d 106, 659 P.2d 1092 (1983).

The State of Florida first acknowledged the protection afforded by *Davis* v. *Mississippi* in the following dictum from *Anderson* v. *State*, 241 So.2d 390,393 (Fla.1970), *vacated on other grounds*, 408 U.S. 938 (1972):

> Fingerprints taken by the police before a defendant is arrested and without probable cause would violate his Fourth Amendment protection against unreasonable search and seizure. Under these circumstances, the fingerprints have been held inadmissible.

The Second District Court of Appeal, whence comes the case presently at bar, followed suit in *Kinsler* v. *State*, 360 So.2d 24 (Fla.2d DCA 1978), wherein police coerced the defendant to submit a footprint impression for comparison with prints found at the scene of a burglary. This remained the law of Florida until September 16, 1983.

B. *Hayes v. State: Davis* Excepted, *Terry* Extended

On May 13, 1980, a denouement began in Punta Gorda, Florida, remarkably like the situation described in *Davis* v. *Mississippi*. The primary clue available to officers investigating the rape of Mrs. Julienne Hollander was a set of fingerprints found on a bedroom doorknob. Petitioner Joe Hayes was one of a number of suspects developed during the ensuing investigation. Probable cause was lacking to arrest anyone, and no warrants were sought although the police desired to make fingerprint comparisons. Petitioner accompanied Detectives Shoup and Gandy to the police station only as an alternative to formal arrest. He was arrested and charged after his prints were found to match those from Mrs. Hollander's home. Relying heavily on *Davis v. Mississippi* and *Anderson* v. *State*, *supra*, Petitioner moved to suppress the fingerprints. The trial court denied the motion and the Second District Court of Appeal affirmed. *Hayes* v. *State*, 439 So.2d 896 (Fla.2d DCA 1983), *rev. den.* 447

So.2d 886 (Fla.), *cert. granted* 53 U.S.L.W. 3236 (Oct. 2, 1984). In the process they greatly expanded the permissible scope of searches and seizures under Florida law.

At the trial level counsel for the State had argued that probable cause existed for Petitioner's arrest, or in the alternative, that he had freely consented to submit his prints. Both claims were rejected by the Court of Appeal. They held that, in fact, probable cause was lacking and that evidence of consent was "at best, highly questionable." *Hayes*, 439 So.2d at 898. *Cf. Bumper* v. *North Carolina*, 391 U.S. 543 (1968); *Judd* v. *United States*, 190 F.2d 649 (D.C.Cir. 1951); *Pekar* v. *United States*, 315 F. 2d 319 (5th Cir. 1963); *Talavera* v. *State*, 186 So.2d 811 (Fla. 2d DCA 1966).

Despite these seemingly fatal frailties, the court concluded that the seizure of Petitioner's person still was not violative of the Constitution.

> Appellant clearly was seized for purposes of the Fourth Amendment when the officers accosted him on his front porch and asked for his fingerprints. Because this was the sole reason for this intended investigative confrontation and because no interrogation occurred, we conclude that under the narrow circumstances of this case, this was a reasonable seizure or detention of appellant under the Fourth Amendment.

Hayes, 439 So.2d at 899.

The court began its analysis by noting that not all searches and seizures are invalid just because probable cause is lacking, citing principally *Terry* v. *Ohio*, 392 U.S. 1 (1968). They found within *Terry* a "balancing test" between an individual's right of privacy and the right of "[t]he public, and through it the police . . . in effective detection and prevention of crime."

> The focus for the Court in *Terry* and the focus which we follow here is whether the official governmental intrusion was reasonable.

Hayes, 439 So.2d at 899.

From this premise the court went on to make a number of conclusions. First, they held it was "immaterial" whether the prints were made at the police station or on the front porch of Petitioner's home. Next, during "the investigatory stage of the criminal process . . . it does not matter who is moved, the victim or the suspect." Finally, "[w]here there is reasonable suspicion sufficient to justify a stop or detention, it is permissible to stop or detain an individual reasonably long enough to allay or confirm suspicions so as to cause either release or arrest of that individual." Having more or less extricated these conclusions from *Terry* v. *Ohio*, the court ruled Petitioner was "lawfully detained, or seized." *Hayes*, 439 So.2d at 899-900.

Thereupon it was not difficult for the court to find that "[t]he instant case poses the very question left unanswered" by *Davis* v. *Mississippi:* the precise circumstances under which a suspect might be required to submit to fingerprinting despite a lack of probable cause for arrest. *Hayes*, 439 So.2d at 901. The court expressed the opinion that the true meaning of *Davis* had escaped many of the authors relying upon it to exclude fingerprints or similar evidence, including the Florida Supreme Court in *Anderson* v. *State* and its own panel in *Kinsler* v. *State*, *supra*. Not bound by the *Anderson* dicta, the court receded from *Kinsler* to the extent that case would disallow the new holding. The court found Petitioner's fingerprinting was a "minimal intrusion," and that to require judicial intervention before conducting such tests "would unnecessarily hamper efforts both to prevent and to solve

crimes." The procedures followed by the Punta Gorda police constituted only "a logical extension of *Terry;*" to hold otherwise "would render *Terry* a complete nullity." *Hayes*, 439 So.2d at 903.

C. The Fallacy Of The Florida Court's Expansion Of *Terry* v. *Ohio*

The position taken by the Florida District Court of Appeal is wholly invalid. In an effort to demonstrate this invalidity, Petitioner will begin by showing the utter misapplication of *Terry* v. *Ohio*, and then, by reviewing search and seizure law since *Davis* v. *Mississippi*, will argue that no exception has ever been created to the warrant/probable cause requirement, nor should one be created, that is sufficiently extensive to permit the police procedures involved in the case at bar.

Terry v. *Ohio*, 392 U.S. 1 (1968), was a landmark decision permitting limited searches of criminal suspects upon less than probable cause. Specifically, if a police officer believes that the suspect has committed or is about to commit a crime, he may conduct a limited "pat-down" for weapons if he reasonably believes the suspect is armed and dangerous.

Quite obviously, the Second District Court of Appeal believed that *Terry* was intended as a point of departure from the long-established requirement that *evidentiary* searches be based upon probable cause. Nothing could be farther from the truth. As *Terry's* companion case made clear, the *Terry* exception was created for "the protection of the officer by disarming a potentially dangerous man." *Sibron* v. *New York*, 392 U.S. 40,65 (1968). *See also*, *Dunaway* v. *New York*, 442 U.S. 200,210 (1979).

In *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), the State of Illinois attempted to do just what the Florida court did in

the case at bar: apply the *Terry* reasonable belief standard "to aid . . . evidence-gathering." *Ybarra*, 444 U.S. at 94. Instead, the Court flatly refused to transform *Terry* into a general investigative tool:

> Nothing in *Terry* can be understood to allow a generalized "cursory search for weapons" or, indeed, any search whatever for anything but weapons.

Ybarra, 444 U.S. at 93-94.

Above and beyond its heretofore unheard-of expansion of *Terry*, The Second District Court of Appeal found authorization for its holding in a number of other cases that merit discussion, because these cases likewise fail to support the court's reliance upon them. For example, the court analogized Petitioner's seizure to vehicle stops based on a "BOLO" broadcast, and to blood tests performed upon suspected drunk drivers. *State* v. *Merklein*, 388 So.2d 218 (Fla.2d DCA 1980); *Pardo* v. *State*, 429 So.2d 1313 (Fla.5th DCA 1983). In so doing they ignored the element of exigency present in those cases but absent in the case at bar. As recognized in *Davis* v. *Mississippi*, 394 U.S. at 727-728, fingerprints are relatively permanent, need by taken but once, and may be seized at any time including one convenient to the person being printed. The "BOLO" cases are distinguishable because they involve a danger of concealment or destruction of evidence, either through the passage of time or the escape of the fleeing suspect. *Cf. United States* v. *Praigg*, 336 F.Supp. 480, 484 (C.D.Cal. 1972). Such cases embody what this Court elsewhere termed "the absence of practical alternatives" to the brief detentions involved. *United States* v. *Brignoni-Ponce*, 422 U.S. 873,881 (1975).

In *United States* v. *Harris*, 453 F.2d 1317 (5th Cir. 1972), *cert. den.* 412 U.S. 927 (1973), the defendant was

suspected of having stolen a check, and postal inspectors desired to obtain his handwriting sample for comparison. The request was made at Harris' home and he was given an opportunity to consult with his parents. Having done so, he consented to give the sample. Nowhere within that opinion is there the suggestion of coercion, or of the nonconsensual asportation from the home to a police station. Very simply, the protection afforded by *Davis* v. *Mississippi* may be overcome if the defendant freely submits to the fingerprinting or similar identification procedure. *See, e.g., Loomis* v. *State*, 261 Ark. 716, 551 S.W.2d 546 (1977); *State* v. *Hoisington*, 104 Idaho 153, 657 P.2d 17 (1983); *Oliver* v. *State*, 8 Md.App. 610, 261 A.2d 498 (1970).

Equally erroneous is the reliance upon *United States* v. *Sanders*, 477 F.2d 112 (5th Cir.), *cert. den*, 414 U.S. 870 (1973), and *United States* v. *Sechrist*, 640 F.2d 81 (7th Cir. 1981). In both cases the defendants' prints were taken while the defendants otherwise were in lawful custody.

> The gravamen of the unconstitutional conduct of the police in *Davis* was the legally unjustified seizure and detention of Davis' person, there being no warrant issued and no probable cause existing for such seizure. A fingerprint taken under those circumstances automatically became a fruit resulting from the constitutionally proscribed seizure of the person. The conduct prohibited by the Fourth Amendment was *the unreasonable seizure of the person.* . . . Once a person is lawfully in custody, the taking of his fingerprints *after his arrest* is procedure not proscribed by the Fourth Amendment.

State v. *Inman*, 301 A.2d 348, 355 (Maine 1973) (emphasis in the original). In *Sechrist*, 640 F.2d at 85, the Court of

Appeal explained that the defendant had previously been arrested, and was in custody, on other charges:

> When the FBI agent took Sechrist's fingerprints in December 1979, Sechrist was incarcerated in the Shawano County Jail, as he was awaiting trial before the Menominee Tribal Court on an unrelated matter. Because he was in lawful custody at the time, there could be no Fourth Amendment violation with respect to the first level of analysis: the "seizure" of the person.

State v. *Anonymous*, 32 Conn.Sup. 306, 353 A.2d 789,794 (1976), explains why this is so:

> A legal arrest ought to carry with it the right to undertake fingerprinting, handwriting exemplars, and other types of purely physical examinations without having to satisfy Fourth Amendment requirements. There is no question that those procedures done subsequent to a legal arrest at police headquarters or within a reasonable period of time thereafter while the defendant is still detained are proper.

Until now the courts were quick to distinguish the fingerprinting of persons with the diminished privacy interests of prisoners or arrestees from the seizure of citizens from their homes or off the streets, practices which involve the "impos[ition of] burdens substantially like those of arrest" including "transportation to the police station." *United States* v. *Jennings*, 468 F.2d 111, 115 (9th Cir. 1972). *See also United States* v. *Anderson*, 490 F.2d 785 (D.C.Cir. 1974); *United States* v. *Whitfield*, 378 F.Supp. 184, (E.D. Pa. 1974), *aff'd.* 515 F.2d 506 (3d Cir. 1975); *People* v. *Peoples*, 616 P.2d 131 (Colo. 1980); *Manor* v. *State*, 225 Ga. 538, 170 S.E. 290 (1969), *vacated on other grounds*, 408 U.S. 935 (1972); *Commonwealth* v. *Tarver*, 370 Mass. 397, 345 N.E.2d 671 (1975); *State* v. *Barber*, 278 N.C. 268, 179 S.E.2d 404 (1971); *State* v.

Sharpe, 284 N.C. 157, 200 S.E.2d 44 (1973); *State* v. *Downes*, 57 N.C.App. 106, 291 S.E.2d 186 (1982).

D. The Absence Of A Constitutionally Acceptable Alternative Justification For The Holding In *Hayes* v. *State*

In *Ybarra* v. *Illinois*, 444 U.S. at 96 N.10, the Court offered a brief overview of the accepted circumstances wherein searches and seizures may be undertaken despite the absence of probable cause.

If any pattern may be said to emerge from this line of cases, it is *not* that the warrant/probable cause requirement is gradually being relaxed in the direction, and to the extent, endorsed by the Second District Court of Appeal in *Hayes* v. *State*, *supra*. Instead, such searches must constitute something more than just one additional evidence-gathering function. Many of the detentions authorized are relatively trivial or across-the-board stops, often involving vehicles. *See*, *e.g.*, *United States* v. *Brignoni-Ponce*, *supra*; *Delaware* v. *Prouse*, 440 U.S. 648 (1979). Certain search procedures are authorized by administrative or statutory fiat; these are generally routine in nature and involve the implied consent of the detainee. *See*, *e.g.*, *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *United States* v. *Biswell*, 406 U.S. 311 (1972). Others involve a justification above and beyond the police officer's general incentive to ferret out evidence of crime. *See*, *e.g.*, *Terry* v. *Ohio*, *supra* (self-protection); *United States* v. *Brignoni-Ponce*, *supra* (exigency); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976) (avoidance of civil liability). They are generally more minimal in scope than full-blown searches (*Terry*, pat-down only; *Brignoni-Ponce*, brief auto stop).

Elsewhere, these exceptions to the probable cause requirement have been described as involving "[an]

overweening emergency" or, absent emergency, administratively-devised checkpoint stops where "the decision to 'seize' is [not made] by the officer in the field" and, possibly, a "judicially issued 'area' warrant." *People* v. *John B.B.*, 56 N.Y.2d 482, 453 N.Y.S.2d 158, 438 N.E.2d 864,869 (1982) (Meyer, J. dissenting). In *United States* v. *Perez*, 440 F.Supp. 272, 283 n.31 (N.D.Ohio 1977), *aff'd.* 571 F.2d 584 (6th Cir.), *cert. den.* 435 U.S. 998 (1978), the court noted an additional distinction between *Camara* v. *Municipal Court* and *South Dakota* v. *Opperman*, *supra*, and the remaining cases: these involve searches conducted essentially for "civil purposes and therefore [are] entitled to great leeway under the Fourth Amendment," as opposed to "a search for evidence of a crime" wherein the police are "required to possess probable cause." *Cf. United States* v. *Praigg*, *supra*.

Under none of these prenumbrae would fall the seizure of the Petitioner Joe Hayes.

In recent years a body of case law has emerged approving the taking of fingerprints and other non-testimonial, identification-oriented evidence, even without probable cause. None of these cases remotely approaches the sort of intrusion to which Petitioner was subjected, nor is it conceivable that the various courts authoring those decisions would have reached the same conclusion on Petitioner's facts. An examination of those cases is nevertheless useful because it indicates, first, what this Court meant when in *Davis* v. *Mississippi* it stated that exceptions to the probable cause requirement might exist for fingerprinting, and second, that this Court certainly never intended such a result as was approved by the Florida court in the case at bar.

In *United States* v. *Dionisio*, 410 U.S. 1 (1973), the Court concluded that a grand jury could properly issue

subpoenas to some twenty individuals, in order to obtain voice exemplars for comparison with recorded conversations already in evidence. The Court reaffirmed that

> in *Davis* it was the initial seizure—the lawless dragnet detention—that violated the Fourth and Fourteenth Amendments, not the taking of the fingerprints.

Dionisio, 410 U.S. at 11. The characteristics of the voice, said the Court, are, like handwriting or facial appearance, something "repeatedly produced for others to hear" and "constantly exposed to the public." *Dionisio*, 410 U.S. at 14. The taking of the voice exemplars would involve a procedure less intrusive than a *Terry* frisk.

> Rather, this is like the fingerprinting in *Davis*, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis* v. *Mississippi*, 394 U.S. at 727.

Dionisio, 410 U.S. at 15.

Crucial to the resolution of *Dionisio* was the majority's conclusion that a grand jury does not operate simply as an arm or tool of the policeman or prosecutor, but as a sort of "protective buffer" between those entities and the accused. *United States* v. *Doe*, 457 F.2d 895, 899 (2d Cir. 1972), *cert.den.* 410 U.S. 941 (1973). *See also In re Grand Jury Proceedings (Mills)*, 686 F.2d 135, 141 (3d Cir.), *cert.den.sub nom. Mills* v. *United States*, 459 U.S. 1020 (1982). In the final analysis, a grand jury is under the control and supervision *of a court*. Similarly, the court in *United States* v. *Hoopingarner*, 438 F.Supp. 366, 367 (N.D.N.Y. 1977), approved Internal Revenue Service summonses pursuant to 26 U.S.C. §§ 7602, 7604, because

of "the interposition of a neutral magistrate between the subject and the investigating agency to prevent abuses."

This hearkens back to that language in *Davis* v. *Mississippi*, 394 U.S. at 728, regarding "narrowly circumscribed procedures" and, particularly, "the authorization of a judicial officer." It will be recalled that the Second District Court of Appeal, in *Hayes* v. *State*, 439 So.2d at 903, dismissed any such judicial authorization as needlessly burdensome. This is perhaps the most flagrant misstatement of the law to be found in the body of that opinion. Prior approval by a magistrate, rather than being needless, is instead crucial and essential, whether in the context of a grand jury investigation or one undertaken by police.

In the wake of *Davis* a number of jurisdictions responded to its dictum by adopting procedures for obtaining fingerprints and like evidence without the necessity of actual arrest.

> Responding to this language, several states adopted statutes allowing judicial officers to issue orders empowering police authorities to seize persons in order to obtain nontestimonial identification evidence. See, Ariz.Rev.Stat.Ann. § 13-3905 (1978); 7B Colo.Rev.Stat. Rule 41.1 (1973); Idaho Code § 19-625 (1979); Iowa Code Ann. §§ 810.2 et seq. (West 1979 & Supp. 1983); N.C. Gen.Stat.§§ 15A-271 et seq. (Repl. 1978); Utah Code Ann. § 77-8-1 (Repl. 1982), See, also, Model Code of Pre-Arraignment Procedure app. VIII at 699 et seq. (1975). In most instances the orders issue upon an affidavit of a police officer showing that there is probable cause to believe that an offense has been committed; that there are reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense; and that the results of specific nontestimonial identifica-

> tion procedures will be of material aid in determining whether the person named in the affidavit committed the offense. In the only reported case we have found involving a direct constitutional attack on this type of statute, the statue was upheld. *People* v. *Madson*, 638 P.2d 18 (Colo. 1981).

State v. *Evans*, 215 Neb. 433, 338 N.W.2d 788, 792 (1983). Based on a review of recent Supreme Court search and seizure decisions (not unlike that undertaken by the court in *Hayes* v. *State*) the Colorado Supreme Court in *People* v. *Madson*, 638 P.2d at 31-32, concluded:

> [L]imited intrusions into privacy on less than probable cause are reconcilable with the Fourth Amendment guarantees when the following conditions exist. First, there must be an articulable and specific basis in fact for suspecting criminal activity at the outset. Second, the intrusion must be limited in scope, purpose, and duration. Third, the intrusion must be justified by substantial law enforcement interests. Last, there must be an opportunity at some point to subject the intrusion to the neutral and detached scrutiny of a judicial officer before the evidence obtained therefrom may be admitted in a criminal proceeding against the accused.

The requirements of the Colorado law upheld in *Madson* are quite stringent. In addition to the general requirements noted in *State* v. *Evans*, *supra*, the court order must specify the particular type of identification procedure sought to be conducted. Upon completion of that procedure the suspect must be either arrested or set free. No person detained under the rule may be held any longer than is reasonably necessary to conduct the specified test. The order may be executed only within daylight hours, absent a showing the suspect is likely to flee the jurisdiction, and is valid for only ten days after its issuance. No search of the person may be performed absent a separate search warrant. The products of the

testing procedures are subject, upon motion, to destruction if, as a result, probable cause for arrest is still lacking. *People* v. *Madson*, 638 P.2d at 32-33. *Cf. Baker* v. *State*, 449 N.E.2d 1085, 1090 (Ind. 1983).

Interestingly, the Nebraska Supreme Court, in *State* v. *Evans*, 338 N.W.2d at 794, noted that both Colorado and Arizona, the latter in *State* v. *Grijalva*, 111 Ariz. 476, 533 P.2d 533, *cert. den.* 423 U.S. 873 (1975), require only reasonable grounds to connect the detainee with the crime under investigation, not probable cause. Even so, the Nebraska court declined to adopt a similarly relaxed standard, citing *Dunaway* v. *New York*, *supra*, and *Florida* v. *Royer*, 460 U.S. 491, 75 L.Ed.2d 229, 103 S.Ct. ____(1983).

> We find these cases persuasive in reaching the conclusion that the compulsion of a person by police officers to accompany them to a police station or hospital, or wherever, and the forced submission to nontestimonial identification procedures, is a seizure of such magnitude that more than a mere suspicion is required. We read the identifying physical characteristics act to require a showing or probable cause to believe the person to be so seized has engaged in an articulable or criminal offense prior to the judicial officer issuing an order pursuant to [Neb.Rev.Stat. § 29-3303 (Reissue 1979)]. As so interpreted, the act is constitutional. It would be anomalous and indeed bizarre to require such probable cause prior to the seizure of papers, books, and other objects, but not for the seizure of persons.

A year earlier the New York Court of Appeals had reached the same conclusion:

> Further, whatever doubt dicta may have introduced into the subject in *Davis* v. *Mississisippi*. . . has been dispelled by *Dunaway* v. *New York* . . . which squarely held that the seizure of a person can never be undertaken for less than probable cause.

In re an Investigation into the Death of Abe A., 56 N.Y.2d 288, 452 N.Y.S.2d 6, 437 N.E.2d 265, 269 (1982).

The Court in *Dunaway* was only echoing its earlier pronouncement in *Davis* v. *Mississippi* that it is not the evidence itself that is subject to criticism, but the means employed to gain that evidence. *Cf. Commonwealth* v. *Youngblood*, *supra*. Rejecting New York's attempt, basd on *Terry*, *Brignoni-Ponce*, and other such cases, to justify some seizures of the person on a relaxed standard, the Court stated:

> In contrast to the brief and narrowly circumscribed intrusions involved in those cases, the detention of petitioner was in important respects indistinguishable from a traditional arrest.

Dunaway, 442 U.S. at 212.

A bitterly-divided Court in *Florida* v. *Royer*, *supra*, rejected the detention of an airline passenger suspected of drug trafficking. Mr. Justice Rehnquist, dissenting, found no distinction in principle between the brief detention of suspected smugglers, about to board airplanes or exit terminals, and the equally brief detention of vehicles suspected of involvement in transporting illegal aliens, a procedure previously approved by the Court. His emphasis on Royer's "40 foot journey" illustrates a crucial distinction between what the police sought to accomplish in that case and the means employed in the instant case. *Royer*, 75 L.Ed. 2d at 258. Even so, the majority held that even under those much less intrusive circumstances the police may not "seek to verify their suspicions by means that approach the conditions of arrest." *Royer*, 75 L.Ed.2d at 237.

Even more recently, the Court reaffirmed that exceptions to the probable cause requirements are few and

narrow. Citing, *inter alia*, *Michigan* v. *Summers*, 452 U.S. 692 (1981), the Court identified "three law enforcements interest that justif[y] limited detention": preventing flight as a judicially-authorized search is being conducted, minimizing the chance of harm, and the orderly completion of that search. *United States* v. *Place*, 462 U.S. 696, 77 L.Ed.2d 110, 119, 103 S. Ct. ____ (1983).

In light of *Dunaway* and the subsequent authority, it is indeed questionable whether the procedure authorized by Colorado and Arizona passes constitutional muster, as stated by the Nebraska court in *State* v. *Evans*, *supra*. Yet, while a discussion of those procedures is appropriate to illustrate how the Second District Court of Appeal overbroadly depicted the possible fingerprinting exceptions implied by *Davis*, we must not lose sight of the fact that while legal means *might have been* devised and employed to obtain Davis' or Petitioner's prints, *what was actually done* was in violation of the Fourth Amendment and deserving of the invocation of the exclusionary rule.

> Finally, it has been suggested that the controversy about a particular set of fingerprints here is much ado over very little because it would have been simple and proper to have taken appellant's fingerprints in court during trial in order to compare them with the prints said to have been found at the scene of the crime. It is also said that appellant's fingerprints, taken on a proper occasion, were in the possession of the Federal Bureau of Investigation and that these prints could properly have been used in this case. But this argument, like the argument of trustworthiness already discussed, simply does not meet the point. It bears repeating that the matter of primary judicial concern in all cases of this type is the imposition of effective sanctions implementing the Fourth Amendment guarantee against illegal arrest and detention. Neither the fact that the evidence obtained through such detention is itself trustworthy

> or the fact that equivalent evidence can conveniently be obtained in a wholly proper way militates against this overriding consideration. It is entirely irrelevant that it may be relatively easy for the government to prove guilt without using the product of illegal detention. The important thing is that those administering the criminal law understand that they must do it that way.

Bynum v. *United States*, 262 F.2d at 468-469. Remarkably apparent in the instand case is the wanton disregard on the part of Detectives Shoup and Gandy for the prevailing standards of law. The observation of Mr. Justice Blackmun in *Brown* v. *Illinois*, 422 U.S. 590, 605 (1975), is appropriate:

> The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknolwedged that the purpose of their action was "for investigation" or for "questioning" . . . The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.

Or, as noted in *People* v. *Bueno*, 87 Ca.App.3d 163, 151 Cal.Rptr. 55, 58 (App.2d 1979), "the movitation of the officers is a significant factor in determinging whether fingerprint evidence is admissible," citing *People* v. *Clark*, 30 Cal.App.3d 549, 106 Cal.Rptr. 147, 152 (App.4th), *cert. den.* 414 U.S. 852 (1973) (distinguishing arrests "with [a] motive to obtain . . . fingerprints.")

Upon this review of the applicable case law, Petitioner can only conclude as follows:

(1) Fingerprints are not exempt from Fourth Amendment protection simply because of their trustworthiness,

value as an item of proof, or the ease with which they may be obtained. The procedures employed to obtain the prints, including the means of detaining the subject to be printed, must be reasonable and in accordance with constitutional standards.

(2) Investigatory detentions of citizens, particularly those which involve the transportation of the person from one location to another, have always required and continue to require probable cause, at least in the absence of judicial authorization for such detention. The only accepted departures from this traditional standard involve emergency or exigent circumstances not present in the case at bar.

(3) The procedures by certain jurisdictions such as Colorado and Arizona, involving what is essentially a "mini-warrant" or "quasi-warrant," differ from the measures employed against Petitioner in fundamental ways. They require prior judicial authorization. They permit only brief and relatiely convenient detentions. In the wake of *Dunaway* and *Royer*, they may even require probable cause no less than does an actual arrest, notwithstanding the dictum in *Davis* v. *Mississippi* whence they originated.

(4) The Second District Court of Appeal erred in condoning the activities of the police in the instant case, specifically, in rejecting the probable cause requirement and the necessity of prior judicial approval. Their decision is particularly egregious given the flagrant disregard for law displayed by these officers, whose intent from the beginning was to effect an arrest but who were legally unable to do so until *after* obtaining the crucial fingerprint evidence.

CONCLUSION

For the foregoing reasons and authorities, Petitioner respectfully submits that the judgment of the Florida District Court of Appeal, Second District, should be reversed and this case remanded for a new trial.

Respectfully submitted,

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